SUPREME COURT, U. S.

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In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1971

No. 71-470

BETTY ERWIN,
Petitioner,

VERSUS

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

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September, 1971

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In the
Supreme Court of the United States
OCTOBER TERM, 1971

No. ————

BETTY ERWIN,
Petitioner,

VERSUS

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Betty Erwin, your petitioner, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above entitled case on the 12th day of July, 1971.

OPINIONS BELOW

The opinion and judgment of the Court of Appeals is not officially reported. The opinion containing Findings of Fact, Conclusions of Law, and Judgment, of the District Court for the Western District of Oklahoma, is reported at 302 F.Supp. 693. (A copy of the Circuit Court opinion is in the Appendix A at pages i-v, and a copy of the District Court opinion is in the Appendix B at pages vi-xviii.)

JURISDICTION

The opinion and Judgment of the Court of Appeals was entered on the 12th day of July, 1971. Petition for Rehearing was denied August 18, 1971. Order Staying Mandate Pending Certiorari until September 17th was entered the following September 1st, and time thereon was subsequently enlarged until October 1, 1971, by Order dated September 21, 1971. The jurisdiction of this Court is invoked under the provisions of 28 U.S.C. Sec. 1254(1).

QUESTIONS PRESENTED

1. Does "* * * the law of the place" in that portion of 28 U.S.C. 1346 (Federal Tort Claims Act) which makes the United States liable, as any other defendant, "* * * under circumstances where the United States, if a private person would be liable to the claimant in accordance with *the law of the place* where the act or omission occurred.", include case law which clearly defines the admissibility of substantive evidence (in an exception to the hearsay rule based upon *res gestae*) published in a clearly announced line of decisions by the Oklahoma Supreme Court?

2. Was the Tenth Circuit Court of Appeals correct in disregarding the "clearly erroneous" rule in Federal appellate procedure, and reversing a judgment reached by the Judge of the Western District of Oklahoma, on error contained in the admission of hearsay-by-definition evidence, when the case came within the provisions of the Federal Tort Claims Act, an exception to the hearsay rule had been clearly defined and provided by Oklahoma Courts, and the parties, to whom the hearsay was ascribed were all dead?

3. Can the "Cardozo Formula" (as originating in *Mark's Dependents* v. *Gray*, 167 N.E. 181) for the determination of civil liability under the doctrine *respondeat superior*, be applied in a case brought under the Federal Tort Claims Act, where the single discharge of a duty of care whereupon vicarious liability might be based, is in the alleged failure to furnish protection and safe-keeping to a government owned vehicle in accord with instructions from authorized superiors, by its driver-at-time-of accident, an acknowledged government employee?

FEDERAL STATUTES INVOLVED OR APPLICABLE

Section (b) of 28 U.S.C. 1346: United States as Defendant.

"(b) Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

42 U.S.C.A. 2991c(b): Federal Employees.

"All volunteers during training pursuant to section 2991a(a) of this title and such volunteers as are assigned pursuant to section 2991a(a)(2) of this title

shall be deemed Federal employees to the same extent as enrollees of the Job Corps under section 2716(b) and (d) of this title. (c) For the purposes of subchapter III, chapter 73 of Title 5, a volunteer under this subchapter shall be deemed to be a person employed in the Executive branch of the Federal Government."

STATEMENT OF CASE

The action was under the Federal Tort Claims Act (28 U.S.C. Secs. 1346(b), 2671-2680) based on an intersection collision of automobiles at a rural highway intersection in the Western District of the United States Court for Oklahoma. One belonged to the United States and was being driven by a Margaret Ann Stack, VISTA volunteer. A second VISTA volunteer was passenger in the government car. Both girls were killed instantly and the exact motives and purposes which impelled them to the scene of their deaths will never be known. Certain statements they made immediately before the accident, and certain actions performed with the making of the statements, were indicative of, or constituted circumstantial evidence on, their states of mind and the reason for the trip, and became *res gestae,* in legal contemplation.

The second car was driven by one Louis Odell Erwin, who was killed instantly. His wife, Betty Erwin, the designated plaintiff in the case, was seriously and permanently injured. The dead Erwin left two dependent minor children.

The case was tried to the court without a jury as required by the Tort Act. It was stipulated that the government owned the automobile and that the driver was an

employee. However, it was denied that the case came under the Tort Act because the driver-employee and her companion were beginning their vacations, and were outside the scope of employment in an unauthorized use of the automobile. Plaintiff contended that the case came under the Tort Act, and that scope of employment existed even though the employees were starting vacations, because of the alleged duty of the employees to furnish safe-keeping and custodial care to the automobile in their charge, pursuant to specific training and instructions from supervisors.

Findings of fact and conclusions of law were made in the Trial Judge's opinion published at 302 F.Supp. 694. (See Appendix B, pages vi-xviii.) Briefly, from the opinion, it was held:

> "The Court finds that Margaret Ann Stack (the VISTA volunteer at the wheel) failed to stop at the stop sign, or if she did stop, she drove onto the favored highway when she could see, or should have seen, that she could not do so with safety * * *. The Court finds from all the facts and circumstances and evidence that the accident and resulting injury to all the parties was caused directly and proximately by gross negligence on the part of Margaret Ann Stack, defendant's employee, and for which the defendant is liable."

Basic to the decision, in view of the divergent positions of the parties on the issue of scope of employment, was the finding of the trial court on the "dual purpose" of the trip. It was said:

> "The court finds * * * Margaret Ann Stack was a VISTA volunteer, and as such she was furnished and assigned a Ford station wagon by the defendant, United States of America, * * *. The facts and circum-

stances in this case which support 'employment with and scope of employment' are: Margaret Ann Stack was employed by defendant. Margaret Ann Stack was furnished an automobile for her exclusive use in the performance of her duties, which vehicle was owned by the defendant. Her immediate employer at Mangum, Oklahoma, knew she was leaving to begin her vacation and knew she had possession of the vehicle in question; her employer at Mangum, Oklahoma, did not instruct her or tell her what to do with the vehicle while she was on her vacation; it would have been dangerous for Margaret Ann Stack to leave the vehicle unattended at her residence in a poor neighborhood where vandalism was prevalent; it was her duty and her obligation to care for the vehicle in question and not subject it to undue risks, and one of the purposes of bringing the automobile to Oklahoma City was to properly protect it and the other was to begin her vacation."

The trial court awarded plaintiff judgment, on findings that she:

"* * * is entitled to recover from defendant the aggregate sum of $125,315 which the Court finds should be proportioned as follows, to wit: (a) to Betty Erwin for her personal injuries, medical expenses, hospital expenses, pain and suffering and for property damage, the sum of $35,315; (b) to Betty Erwin for her loss of support and maintenance because of her husband's death, the sum of $30,000; (c) to Betty Erwin for the use and benefit of Kevin Erwin for his support, maintenance and education, the sum of $30,000; and (d) to Betty Erwin for the use and benefit of Stanley Erwin, for his support, maintenance and education, the sum of $30,000."

After the government had indicated its intention of prosecuting an appeal, the plaintiff elected to cross-appeal on the inadequacy of the award for the wrongful death of the husband and father, considering the ages of the minor dependents. Hence, the designations of "cross-appellant and cross-appellee" in the caption. The disregard of merit in the cross-appeal by the Circuit Court of Appeals has no relevancy to this application for a writ, and beyond this explanatory statement, no further reference to it will be made herein.

The Tenth Circuit Court of Appeals reversed the judgment with an order "the case must be reversed with directions to enter judgment for the defendant." Quoting from the opinion of the Court (Appendix A, pages i-v):

> "The finding of the trial court that the trip to Oklahoma City was in part to store the government car is based entirely on hearsay testimony, and the trial court so characterized it as it was received. This evidence was admitted as the trial to the Court progressed, but no additional direct proof as to the scope of employment issue was thereafter introduced. Under these circumstances we must hold that there was no probative evidence to support a finding of dual purpose for the trip. The only proof that remained is that the trip was made for purely personal reasons."

There was a short, specially concurring opinion by Judge Pickett, attached. In the published opinion by all of the judges, filed July 12, 1971, it appears that the single ground for reversal was in the complete rejection of the testimony of three of plaintiff's witnesses, because it was hearsay.

In Judge Pickett's specially concurring opinion, it was said "I concur * * * but I think the decision should be based on broader grounds. * * * Even if they intended to transport the government automobile for safe-keeping, this would not meet the Oklahoma test of 'scope of employment.'" In 1929, Justice Cardozo, in *Mark's Dependents* v. *Gray*, 167 N.E. 181, said: (See Appendix A, page v.)

> ". . . The test in brief is this: If the work of the employee creates the necessity for travel, he is in the course of his employment, though he is serving at the same time some purpose of his own. * * *"

Petition for rehearing was filed within the time allotted. It was denied. An order staying the mandate was procured so that this petition for writ of certiorari might be filed.

STATEMENT OF FACTS

It was stipulated at the trial that the automobile belonged to the United States, that it was being driven by Margaret Ann Stack, and that the driver was an employee of the government. The co-worker, who was killed in the accident, was named Diane Short. The government automobile had been obtained from a surplus material section of General Services Administration and had been transferred through regular channels to an authorized Community Action Project, under the Office of Economic Opportunity, at Mangum, Oklahoma. VISTA, at Austin, Texas, sent or loaned Margaret Ann Stack and Diane Short to the Community Action Group at Mangum, to assist with its work, at its request.

Prior to being assigned to the Community Action Group at Mangum, the girls had had indoctrination training at the University of Oregon. Evidence indicated that the girls were directed and taught how to care for a government issued automobile. This proof was furnished by Raymond N. Lowe, Professor of Education at the University of Oregon, and Director of the Western Regional Training Center for VISTA under contract with OEO. See notes (O.R. Vol. XII, pp. 11-22).[1] Also by Russell Joseph Jewert, area coordinator for VISTA Regional Office, Austin, Texas (O.R. Vol. XI, pp. 28, 45-46), and William Finister, Governmental Relations Co-ordinator for the Southwest Region of OEO, also of Austin. The three witnesses aforementioned all testified that a VISTA volunteer, to be effective in the area where Margaret Ann Stack and Diane Short worked, had to have an automobile available around the clock. This was corroborated by Randy Rutherford (O.R. Vol. VI, pp. 2-6), Director of the community action group at Altus, Oklahoma, John Haven (O.R. Vol. VIII, pp. 24-25), Project Director for the group, and Gary Gress (O.R. Vol. IX, pp. 3-4), a male VISTA volunteer in the organization.

In accord with recommendations of VISTA, Margaret Ann Stack and Diane Short lived as close to their work project as they could. They worked in a blighted area, of mixed races, and they lived in the area. The government issued car was kept on their driveway in the blighted neighborhood. The proof showed that it was subject to thievery, pilferage, and vandalism, if left unwatched.

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[1] For convenience of reference, volume and page numbers in the Original Record, to be certified by the Court of Appeals, will be preceded by "O.R."

Margaret Ann Stack and Diane Short worked long enough on their jobs to become eligible for one week vacations. They applied for leave and it was granted. The proof at the trial showed that they continued to stay on the job after the specific beginning date of the vacation, but that there was nothing unusual about that. The written authorization on Margaret Ann Stack indicated that her leave "commenced at Oklahoma City." They had specific directions not to use the car for personal purposes, but to use it only for the purposes incident to the employment. There was nothing in the pleadings, or nothing in the evidence or statements at the trial, to indicate that the girls deceitfully, or surreptitiously, took the car without authority, to further any purpose of their own in reaching Oklahoma City.

The testimony of John Haven, Project Director of the Group at Mangum, showed that on the day before the fatal accident "the girls" asked him to "get Walt Mason on the phone for them" at Oklahoma City. This was in Haven's office, at Mangum. He got Walt Mason on the phone and "recognized his voice" (O.R. Vol. VII, pp. 9-16). Then he handed the instrument to "one of the girls" and did not remain to hear the conversation which was had. Mason's testimony on this telephone conversation was a part of that held objectionable as hearsay. Mason, who was an authority on Community Action work and development, and known as such in the southwest Oklahoma area, had given both girls instructions on their projects in his office in Oklahoma City, had called on them at Mangum and helped them with their projects, and had numerous VISTA volunteers in his own organization. He testified that they told

him they wanted a place to leave the government car while they were on vacation. He told them: "Report to me when you reach Oklahoma City. I will see if I can help you to place it."

On the same day the girls told Chief Ballard, Chief of Police at Mangum, that they wanted him to watch their place while they were gone, as against theft or pilferage. They told him, in substance, that they were taking the automobile to Oklahoma City to place it in a motor pool (O.R. Vol. VI, pp. 39-40). Ballard's testimony, relating this conversation, was a part of the hearsay held objectionable in the order reversing the case.

On the day of the fatal accident, on their way out of town, they stopped at a filling station to have the car serviced. At that time they told Mr. Sheward, another one of the witnesses whose testimony was held to be objectionable as hearsay, that they were taking the car to Oklahoma City to put it in a motor pool (O.R. Vol. VI, pp. 36-37).

At the trial, and in the briefs on appeal, the government indicated that it recognized a certain responsibility, under the VISTA program, which would require a VISTA volunteer to provide some safe-keeping to a vehicle issued to her, under existing circumstances. It was argued that they could have left the car with John Haven in Mangum. Or, that they could have taken it to Altus, thirty-five miles distant, and left it with one Robert G. Grove, Co-ordinator of Vocational Training for the community action group at Altus, and from whom the vehicle was obtained (page 20 of Original Brief of the United States filed in Circuit Court). It was on such proof, including the alleged hear-

say, that the judgment reflected in the reported opinion, was found.

REASONS FOR GRANTING WRIT

The writ should be granted because the decision of the Tenth Circuit Court of Appeals is erroneous, is inconsistent with prior principles of *stare decisis*, will present conflict and confusion in interpretation of case law in the future, and will result in a miscarriage of justice, for the following reasons, and in view of the sum of the following reasons:

1. The Court of Appeals has rendered a decision which disregards established substantive case law of Oklahoma, in its relation to a fundamental part of 28 U.S.C. 1346(b) (Federal Tort Claims Act) which, more specifically, provides "* * * in accordance with the law of the place where the act or omission occurred."

2. The Supreme Court of the United States will assume jurisdiction where case presents important aspect of still undetermined extent of government's liability under Federal Tort Claims Act, and grant certiorari. *Massachusetts Bonding and Insurance Co., et al.* v. *United States,* 77 S.Ct. 186, 352 U.S. 128, 1 L.Ed.2d 189; *Hess* v. *United States,* 80 S.Ct. 341, 361 U.S. 314, 4 L.Ed. 305.

3. Under Federal Tort Claims Act, standards and tests of state where alleged wrongful or negligent act was committed are to be used to determine whether a claim against Federal Government has been established upon which recovery can be allowed, and nature and extent of

the recovery. *Van Wie* v. *United States* (D.C., N.D. Iowa), 77 F.Supp. 22; *State of Maryland* v. *United States* (4 Cir.), 165 F.2d 869. See also *Massachusetts Bonding and Insurance Co., et al.* v. *United States*, 77 S.Ct. 186, 352 U.S. 128, 1 L.Ed.2d 189; *Hess* v. *United States*, 80 S.Ct. 341, 361 U.S. 314, 4 L.Ed. 305.

4. The failure of the Circuit Court to recognize substantive evidence law of the State of Oklahoma and accord it respect consistent with *stare decisis* doctrine threatens to deprive a citizen who has been widowed and left with two dependent fatherless children by the grossly negligent operation of an automobile owned by the United States and in service to the poverty fighting Office of Economic Opportunity, of due process of law. The threatened miscarriage of justice does not result from the treatment of a mixed question of law and fact, but from erroneous misapplication of a pure principle of law.

Statements made as part of *res gestae* are "substantive evidence" of the matters stated. *Muntz* v. *Travelers Mutual Casualty Co.*, 295 N.W. 837.

The *res gestae* rule justifies admission of hearsay testimony on ground that spontaneity and unreflecting character of extrajudicial statements are sufficient safeguard of trustworthiness. C.C.A. Michigan, 1941. *Fort Street Union Depot Co.* v. *Hillen*, 119 F.2d 307, *cert. den.* 62 S.Ct. 82, 314 U.S. 642, 86 L.Ed. 515.

5. The question here involved is not a mixed one of law and fact, nor does it involve a purely local matter of no national importance, but is one of law, which with establishment as a final expression of a Federal Appellate

Court will assume a place in the rule of *stare decisis*, and will establish a principle capable of influencing the inequitable disposition of claims and cases arising under the Tort Claims Act in the future.

"*Stare decisis*" means to stand by decided matters. The doctrine is a policy of following rules or principles laid down in previous judicial decisions unless they contravene in the ordinary principles of justice. *Windust* v. *Department of Labor and Industries*, 52 Wash.2d 33, 323 P.2d 241, 243.

6. The language of the Tort Act and decisions construing it require that tests and standards of the state where the alleged negligent act is committed are to be used in determining whether the claim has been established and what disposition shall be made of it. The trial judge in this case, having done this by employing the substantive evidence principle according to *stare decisis* rule in Oklahoma, arrived at a point where a fact question was presented for decision. Under the "clearly erroneous" rule his decision on the fact question should not have been disturbed.

Much must be left to sound discretion of trial judge in rulings on admissibility of hearsay testimony under *res gestae* rule. *Fort Street Union Depot Co.* v. *Hillen*, 119 F.2d 307, *cert. den.* 62 S.Ct. 82, 314 U.S. 642, 86 L.Ed. 515.

7. Federal rule that findings of fact shall not be set aside unless "clearly erroneous" and that due regard shall be given to opportunity of trial court to judge of the credibility of witnesses requires that an appellate court make allowance for advantages possessed by trial court in ap-

praising significance of conflicting testimony, and reverse only "clealy erroneous findings." Rule 28, Federal Rules Civil Procedure; *Graver Tank and Manufacturing Co.* v. *Linde Air Products Co.*, 69 S.Ct. 535, 336 U.S. 271, 93 L.Ed. 672.

Every case involving admissibility of hearsay testimony under *res gestae* rule must depend on its particular facts (4th syl.). *Fort Street Union Depot Co.* v. *Hillen*, 119 F.2d 307, *cert. den.* 62 S.Ct. 82, 314 U.S. 642, 86 L.Ed. 515.

8. The law of the "Cardozo Formula" as applied in the specially concurring opinion of the decision reversing is repugnant to the theory of liability of petitioner's case, and prior decisions of State and Federal Courts which authorize such liability. If permitted to stand it will present conflict and confusion in case law, and tend to eliminate rights of action in cases where possession of chattels for safe-keeping may create liability under *respondeat superior*.

9. The decision, with its disregard of established case law in Oklahoma and the peculiar circumstances of the case itself, departs from the accepted and usual course of judicial proceedings, and requires the exercise of this Court's power of supervision.

ARGUMENT

It was never contended that Margaret Stack, the driver of the government car, was on a specific mission or performing any errand in the furtherance of her work-duties in the anti-poverty program so as to make the government, the employer, liable under *respondeat superior*. There was one ground, and one ground only, upon which petitioner sought to predicate vicarious liability. The one ground was stated in the complaint. The one ground was pursued at the trial. It was: that the training, teaching and indoctrination, in qualifying the driver for work as a VISTA volunteer, had imbued her with a sense of responsibility for the safety of the government-owned car and that she had a duty to provide safe-keeping for it before she was completely out of service. Her superiors, knowing she was leaving the field of her work, failed to help her with finding a place for the car, and left her on her own. She was doing the best she could, in good faith, toward placing the car in a secure place while she was gone, when she became involved in the collision. Liability against the government was found in such performance of duty in *Cook* v. *United States*, 240 F.Supp. 353. And with reference to "dual purpose," the trial judge could have been influenced by *United States* v. *Johnson*, 181 F.2d 577, and *United States* v. *Wibye*, 87 F.Supp. 830, 191 F.2d 181, which held (the same in both cases in separate paragraphs of syllabus):

> "Where the servant is combining his own business with that of his master, or attending to both at substantially the same time, no nice inquiry will be made as to which business the servant was actually engaged

in when a third person was injured, but the master will be held responsible unless it clearly appears that the servant could not have been directly or indirectly serving his master."

The presumption of scope of authority was in effect. *Stumpf* v. *Montgomery* (Okla.), 226 Pac. 65; *Pacheco* v. *United States,* 409 F.2d 1234. The entire onus of petitioner's case was to sustain the existing presumption against the government's responsibility to rebut it, by proof that the actions of the driver were required by the owner of the vehicle, and that such actions were a part of the driver's duty to the employer. Not in the furtherance of poverty-fighting, but in the furtherance of keeping safe the valuable automobile which was a part of her work equipment.

Plaintiff's proof was made by the testimony of witnesses who heard the government employee, deceased at the time of trial, make certain statements regarding motivations of her actions. Although these statements were hearsay-by-definition, they were part of the *res gestae,* competent under Oklahoma's *res gestae* exception to hearsay, and, as such, furnished substantive evidence on the point in issue.

Under the *stare decisis* doctrine, an exception exists to the hearsay rule in Oklahoma, which, in its application is not procedural, but substantive in effect and capable of establishing probative proof, because it depends upon its *res gestae* quality for its admission, application and effect. *Phillips Pet. Co.* v. *Ward,* 74 P.2d 614; *Norton, et al.* v. *Harmon,* 133 P.2d 206; *Hurt* v. *Garrison,* 133 P.2d 547. The rule in Oklahoma, in general terms, may be stated thus:

> If facts have been established by competent evidence, or by admissions or stipulations, to place in operation the legal presumption that a servant-driver is engaged in business, or on a mission, for his employer-owner, then statements made reasonably contemporaneous with the accident by the servant-driver regarding the nature and extent of his actions, became admissible, although otherwise hearsay, since they are a part of the *res gestae*.

This is not a current rule, or a local rule. As a developing rule of case law, in the *stare decisis* system, the Oklahoma Supreme Court adopted the rule from the Michigan Supreme Court which had simply reannounced it in its decision in *Haughton, et al.* v. *Maurer,* 55 Mich. 323, 21 N.W. 426.

The exception to the hearsay rule in this case which made admissible and competent the testimony of the three witnesses, had its origin in Oklahoma case law in *Citizens Bank of Gans* v. *Mabray,* 215 Pac. 1067 (citing *Haughton, et al.* v. *Maurer, supra*). Then, with reappearance of the issue, the rule was reannounced in *Williams* v. *Mayes Lumber Co.,* 299 Pac. 85; *Stover* v. *Mackie,* 41 P.2d 474; *Phillips Pet. Co.* v. *Ward,* 74 P.2d 614; *Norton, et al.* v. *Harmon,* 133 P.2d 206, and *Hurt* v. *Garrison,* 133 P.2d 547. *Hurt* v. *Garrison,* in 1942, reaffirmed that if the relationship was admitted or otherwise established, and the issue on trial was only that of the scope and extent of authority of the servant at a given time, the hearsay bar would fall, and statements enlightening to the trial court on the issue would become admissible as corroborative of the already established relationship, as part of the *res gestae*. To obtain the

full import of this exception, we reproduce a brief excerpt from *Hurt* v. *Garrison*, just referred to:

> "* * * Therefore, a different rule comes into effect to wit, that a known agent's declarations that he is acting for the principal are admissible in evidence to show that the agent was acting for the principal at the time. We said in Citizens Bank of Gans v. Mabray, 90 Okla. 63, 215 Pac. 1067, that as a general rule the declarations of an agent to a third party in the absence of the principal are inadmissible to establish agency, but that a recognized exception exists when the agency is otherwise established and such declarations are admissible in evidence and especially when made as a part of the res gestae."

The Tenth Circuit recognizes the existence of the legal presumption in Oklahoma case law, to the effect that established ownership of a vehicle plus fact of general employment creates the presumption that employee acts in scope of employment, at the occurrence of a contested transaction. It cites *Stumpf* v. *Montgomery*, 226 Pac. 65, an early Oklahoma case so holding, at page 6 of its decision. (See page iv, Appendix A.) But it places an unauthorized restriction upon the effect of such presumption, or the probative weight accorded it as clearly indicated in *Norton, et al.* v. *Harmon*, and *Hurt* v. *Garrison*, referred to and quoted herein.

Since it was presumed that Margaret Ann Stack, the driver, was acting in the scope of her employment, and since the opinion of the Tenth Circuit Court says (also at page iii, Appendix A): "* * * the only probative evidence is that the trip was made for purely personal reasons.", the said opinion, reversing, must imply that the rule in

Oklahoma, to make the details (substantive effect) of an agent's statement competent as corroborative and as part of the *res gestae,* will not rest on the presumption of scope, alone, but must have, in addition to the legal presumption, some additional and direct corroborative testimony. This is not correct, according to clear announcement in Oklahoma Supreme Court decisions, as hereinbefore cited and hereinafter quoted.

No authority for such a position is advanced, by anyone, to support the position or to overrule the law in *Norton, et al.* v. *Harmon.* Under the language of section (b) of 28 U.S.C. 1346, the law of *Harmon* and the subsequent cases should be controlling. And the inference from *Pacheco* v. *United States,* 409 F.2d 1234, with its expression "the presumption (exact same type) would have continuing existence in plaintiff's action under Federal Tort Claims Act even in the face of any evidence which the government might produce contradicting factual elements from which presumption arose.", appears to be contrary to the conclusion of the Tenth Circuit Judges, if said Judges do conclude that the presumption alone, under the Oklahoma decisions, does not place the announced exception in operation.

Unless the announcement of the Oklahoma Court on the rule is ambiguous, or unacceptable for other reasons, and unworthy of respect, it must be acknowledged that the law in Oklahoma establishes:

> "AT THE TIME PLAINTIFF WAS PERMITTED TO TESTIFY WITH REFERENCE TO THE STATEMENT OF DEFENDANT NORTON, THE FACTS HAD BEEN ESTABLISHED WHICH GAVE RISE TO

THE PRESUMPTION THAT THE DRIVER, NORTON, WAS ENGAGED UPON THE BUSINESS OF THE DEFENDANT SALES CORPORATION. THE STATEMENTS WERE THEREFORE ADMISSIBLE IN CORROBORATION AND AS A PART OF THE RES GESTAE." (From *Norton, et al.* v. *Harmon.*)

The Circuit Court's opinion, rejecting this which petitioner contends is an exception to the hearsay rule in *Phillips Petroleum Co.* v. *Ward; Norton, et al.* v. *Harmon,* and *Hurt* v. *Garrison,* and containing what authorities designate substantive evidence, says of the law of the cases: "They are not to the contrary and are more concerned with the issue raised by an agent's testimony as to the scope of his employment than with the question before us." This language, if permitted to stand unchallenged, and tc become a part of adopted case law, will rise to present difficult conflict in cases involving the substantive rights of litigants, in the future. It connotes that had Stack survived, and testified in support of respondent's contention that she was on a lark of her own, her statements as contained in the testimony of Chief Ballard, Mr. Sheward, and Mr. Mason, would have then been admissible. This reasoning does not lead to a conclusion consistent with legal conclusions reached and published in numerous Supreme Court decisions in Oklahoma.

The fact that Stack did not survive and take the stand to swear that she was completely out of service should not alter the mandate of this exception to the hearsay rule. The question before the Tenth Circuit Court of Appeals was not the admissibility of evidence to impeach a witness or furnish a standard for his or her credibility, but the

admissibility of proof brought forth in support of a substantive issue on trial, under the authority of Oklahoma decisions, and the propriety of a Federal District Judge's ruling thereon.

In *Norton, et al.* v. *Harmon,* the contested statement was made prior to the involved accident. It was made to a party to the action, and the one who allegedly made it was present at the trial to admit or deny it. Certainly, under the apparent intentions of this rule on the introduction of substantive evidence, the identity of the one hearing the statement would not be material in the determination of the point. If the statement was admissible under the exception and had probative value, whether it was made to an officer, a person at the scene who later became plaintiff, or some bystander, would be immaterial. The material point would be, that with the agency in existence, and with the text of the statement meeting certain requirements of spontaneity, lack of influence, genuineness, *etc.*, the statement itself, as a verbal act, would be corroborative of the relationship legally presumed to exist. That is, if it met the test of admissibility as *res gestae,* according to existing *stare decisis* in the involved area.

Further, the writ should be issued in this case because the opinion reversing the well-reasoned decision of the Federal District Court Judge shows that it is based upon a misconceived fidelity to the hearsay rule.

Reforms in judicial proceedings, and changes from old to new for the better administration of justice, have been spearheaded by movements in the Federal Courts. Some of the departures from rote which come to mind include

adoption of the Revised Rules of Federal Procedure, in 1935; and the discernible increase in trial efficiency since pre-trial procedures were begun, and discovery was made more readily available. Layman, lawyer or judge, meeting the disclosures of the evidence in this case, is bound to understand what motive and purpose impelled the driver, with the master's automobile, to the scene of the crash. The Chief of Police at Mangum, who spoke to the driver before her departure, would not take the stand and relate a false conversation. It was not so contended by the United States. The filling-station witness was a business man, owner of the business. He had no interest or purpose in the outcome of any litigation between the plaintiff and the government. He *said* that the driver *said* that she was taking the car to Oklahoma City to leave it in a motor pool. Although hearsay-by-definition evidence could be instantly recognized in such a statement, the truth contained in it was likewise evident. Walter Mason was a man of refinement. On the date of his testimony at the trial, he was an associate professor at Oklahoma Baptist University. When he related the invitation to "report to my office and I will help you find a place for the car," the truthfulness of such utterances could not be doubted. If the driver and her co-worker had survived the fatal accident and had been able to appear and testify, this important evidence which was produced through hearsay-by-definition would have been brought forth, and the judgment of the lower court would, in all probability, have been affirmed. We say "in all probability," because the opinion reversing the lower court bases the reversal order on the admission of the objectionable hearsay testimony only.

This Court's attention is respectfully invited to a publication dated March, 1971, by the Committee on Rules of Practice and Procedure of Judicial Conference of the United States, entitled Revised Draft of Proposed Rules of Evidence for the United States Courts and Magistrates. In proposed Rule 807 the Committee furnished to the "Bench and Bar" this guideline:

> "HEARSAY EXCEPTIONS: DECLARANT UNAVAILABLE,
>
> "(b) *Hearsay Exceptions.* The following are not excluded by the hearsay rule if the declarant is unavailable as a witness: * * *
>
> (2) *Statement of Recent Perceptions:* A statement, not in response to the instigation of a person engaged in investigating, litigating, or settling a claim, which narrates, describes or explains an event or condition recently perceived by the declarant, made in good faith, not in contemplation of pending or anticipated litigation in which he was interested, and while his recollection was clear. * * *"

In connection with this proposed change the Committee furnished its "definition of Unavailability," in this language:

> "Unavailability as a witness includes situations in which the declarant: * * * (4) is unable to be present or to testify at the hearing because of death or then existing physical or mental illness or infirmity. * * *."

Here is a classic example of the deficit in the existing system of administering law which the Committee of Learned Judges and Lawyers of the United States Courts

lamented, and would correct and improve. Although death could make the witnesses "unavailable," it could not muzzle the truth which was upon their lips.

The Trial Judge heard it, and, having heard it, based his actions upon it. Under Oklahoma law the Trial Judge was correct and the Circuit Judges erred. Under the recommendation of the Committee of the Judicial Conference of the United States, it was right and proper to hear the testimony and examine it for its probative value.

The "Cardozo Formula" referred to in the special concurring opinion by Judge Pickett, is repugnant, within the legal definition of that term, to any theory of vicarious liability based upon duty to care for an automobile. If, in a tort claim case, responsibility may be placed upon the government when a servant's only motive, at the time of the accident, is placing the car in safe storage in accord with defined instructions and duties (*Cook* v. *United States,* 240 F.Supp. 353) and, liability may be found against the government notwithstanding some personal motive of the servant being mixed with the scope of duty (*Wibye* v. *United States,* 81 F.Supp. 830, 191 F.2d 181), then it appears consistent with legal reasoning that liability may exist in a state of facts where the personal motive, either primary or secondary, becomes combined with the discharge, or the attempted discharge of the existing duty to care for a vehicle. It would depend upon the particular, or peculiar, facts, of course. The duty, or liability based upon it, is real, and is constant, if it exists at all. Such a purpose, for the master's benefit, could not be compared to an intangible purpose, or a contemplated action, at the other

end of the trip such as the repair of a leaky faucet by a plumber (the mission involved in the case wherein the "Cardozo Formula" originated) or offering to sell an item of personal property or delivering a parcel of groceries.

It is respectfully urged that the otherwise efficient test which begins with the language: "If the work of the employee creates the necessity for travel * * *," cannot be applied to an alleged legal liability based upon around-the-clock possession of a vehicle with a responsibility to *deliver* the vehicle, itself, the gravamen of the issue. Since no work or mission, *per se,* is involved in a trip to purely relieve the driver of possession and responsibility for the vehicle itself, the invariable answer will be in the negative, and the owner-master must be relieved. The effect of this would be to set up a complete conflict with the previously announced law of *Cook* v. *United States* (a Federal Tort Claims case), 240 F.Supp. 253, and *City of Oklahoma City* v. *Bailey,* 405 P.2d 215, and the decisions preceding them which served as justification, in *stare decisis,* for their publication.

If this opinion with Judge Pickett's special concurrence attached to it becomes a part of the published library on case law, then the law of the cases on the subject previously cited is eliminated, and the United States, and inferentially no other vehicle owner, may be held accountable for the acts of a servant who is, in good faith, moving a car for safe-keeping purposes only, and negligently injures another.

CONCLUSION

It may be noted in the Circuit Court Opinion that the Judges were impressed with the Trial Judge's recognition of the hearsay character of the evidence involved. The Trial Judge is quoted (with reference to Mr. Sheward's testimony) "Well, I think it's hearsay, pure and simple, but the Court will permit him to answer just on the record."; (and with reference to Chief Ballard) "I'm going to let you put it in but then it is hearsay. There might be some justification for it."; and (with reference to Walter Mason) "It is hearsay, of course . . ." But this Court fails to note, or fails to indicate if it did note, that the Judge below, indicating his awareness of the *res gestae* nature of this testimony and its substantive effect under the Oklahoma exception to the hearsay rule, said: "Well, I'll check the briefs on that and I'll look that case over, Mr. Berry *(Norton, et al.* v. *Harmon, supra)*, and if the Court finds that this testimony should be stricken, the Court will strike it, of course" (O.R. Vol. VI, pp. 40-41).

The Tenth Circuit recognized the presumption of scope as created by Oklahoma Supreme Court decisions, based on ownership of the vehicle and the general employment of the driver. It failed to accord the presumption full respect, so as to give probative weight, or substantive standing, as the Oklahoma Supreme Court has done in cases cited. If it had given full faith and credit to the law in Oklahoma, under the doctrine of *stare decisis*, as the language of the Tort Claims Act appears to require, then the testimony, held inadmissible as barred by the hearsay rule, would have been accepted as competent, and

the judgment of the trial court on the disputed question of fact, would have necessarily been upheld.

For these reasons petitioner respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit.

Respectfully submitted,

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September, 1971

APPENDIX A

FILED
United States Court of Appeals
Tenth Circuit
JUL 12 1971
HOWARD K. PHILLIPS
Clerk

UNITED STATES COURT OF APPEALS
TENTH CIRCUIT

July 1971 Term
Nos. 140-70 and 141-70

BETTY ERWIN, Appellee and Cross-Appellant, v. UNITED STATES OF AMERICA, Appellant and Cross-Appellee.	Appeal From the United States District Court for the Western District of Oklahoma (D.C. # C-68-320)

James W. Shepherd, Oklahoma City, Oklahoma (William R. Burkett, United States Attorney, Oklahoma City, Oklahoma, with him on the Brief), for Appellant and Cross-Appellee.

Howard K. Berry, Oklahoma City, Oklahoma (Howard K. Berry, Jr. and James W. Bill Berry, Oklahoma City, Oklahoma, with him on the Brief), for Appellee and Cross-Appellant.

Before PICKETT, BREITENSTEIN and SETH, Circuit Judges.

[APPENDIX]

SETH, Circuit Judge.

This is an appeal by the government from a judgment against it in a tort claims action with a cross-appeal by the plaintiff. The suit arose from an automobile collision involving a government car driven by a government employee. The driver of the government car, and her passenger, a co-worker, were both killed as was the husband of the plaintiff, an occupant of the other car in the collision.

The driver of the government car and her co-worker were employed by the government as VISTA workers under the direction of an OEO recognized corporation engaged in providing assistance to migrant workers in a three-county area in southeastern Oklahoma. The girls had the twenty-four hour use of the government car for their work and were responsible for it. At the time of the accident the two had left the three-county area where they worked, and were going to Oklahoma City to catch a plane for a vacation at their homes in the East.

The issue on appeal is whether the government employees were acting within the scope of their employment at the time of the accident. As mentioned above, the driver and her co-worker had been granted leave and had started their vacation trip to their homes. The personal aspect of the trip in the government car to Oklahoma City is clearly established in the record by competent evidence. The trial court found the girls were proceeding to Oklahoma City to catch an airplane to further their vacations. The court also found the passenger and co-worker was "also" on vacation. The trial court in addition found that the two employees were taking the government car to Oklahoma City for storage or "safekeeping" while they were on vacation. It said: "So the Court holds and finds that the bringing of the car to Oklahoma City was dual in nature. . . . ," and it thus found under a dual purpose doctrine that the employees were within the scope of their

employment. The dual purpose is also mentioned in the trial court's formal opinion.

The finding of the trial court that the trip to Oklahoma City was in part to store the government car is based entirely on hearsay testimony, and the trial court so characterized it as it was received. This evidence was admitted as the trial to the court progressed, but no additional direct proof as to the scope of employment issue was thereafter introduced. Under these circumstances we must hold that there was no probative evidence to support a finding of dual purposes for the trip. The only proof that remains is that the trip was made for purely personal reasons.

The testimony relating to the storage of the car in Oklahoma City came from three witnesses. Mr. Sheward, a service station operator in Mangum, Oklahoma, knew the two employees. Mangum was in the area where the girls were assigned and it was the community where they were living. Mr. Sheward said he talked to them the morning of the acccident, and "the girls" told him they were going to take the car to Oklahoma City and leave it at a motor pool. The court, on objection to the question, stated that it would be hearsay; and said, "Well, I think it's hearsay, pure and simple but the Court will permit him to answer just for the record." Another witness, Mr. Ballard, a police officer who also knew the girls, talked to them the day of the accident at Mangum. He was asked what they told him that morning. This was objected to as hearsay, and the trial court said: "I'm going to let you put it in but then it is hearsay. There might be some justification for it." The witness then testified that the girls told him they had called someone in Oklahoma City and he had told them it would be better to leave the car in Mangum, but they told him they were afraid it would be stripped if left there. This witness stated the girls told him this person told them he would help them store it in Oklahoma City if they brought it there. The court after further objection overruled it but again said: "It is hearsay, of course. . . ."

The third witness, Mr. Mason, was not a supervisor of the girls' work but an acquaintance who held a position in an independent Oklahoma City agency comparable in function to the position held by their supervisor. The girls had called this person, and had asked for his help in parking the car in Oklahoma City. He was asked what the girls had told him, the hearsay objection was made and overruled. He testified they told him they were going on vacation and wanted his help in parking the car in Oklahoma City. He testified: "I told them if they would report to my office when they arrived in Oklahoma City I would see what I could do to assist them." This again was hearsay.

The testimony described above is the only direct evidence on the scope of employment issue as it related to a government purpose, and it was all hearsay. With this record before us, there is no evidence to support a finding of fact on which to base the dual purpose doctrine. As stated above, the only probative evidence is that the trip was made for purely personal reasons. We do not consider this to be a deviation case to make applicable the case of Oil Daily, Inc. v. Faulkner, 282 F.2d 14 (10th Cir.), and the Oklahoma cases therein cited, as urged by plaintiff. Instead this is a particular trip to Oklahoma City and the purpose or purposes were at issue before the trial court.

This evidence as to the personal nature of the trip overcame any presumption which may have arisen from the ownership of the car, and the employment and duties of the driver. See Stumpf v. Montgomery, 226 Pac. 65 (Okla.). Also all the proof was in and it is not a question of a prima facie case as in Pacheco v. United States, 409 F.2d 1234 (3d Cir.), as urged by the appellee. The cases of Phillips Petroleum Co. v. Ward, 74 P.2d 614 (Okla.), and Norton v. Harmon, 133 P.2d 206 (Okla.), cited by plaintiff, are not to the contrary, and are concerned more with the issue raised by an agent's testimony as to the scope of his employment than with the question before us.

The case must be REVERSED with directions to enter judgment for the defendant.

[Concurring Opinion of Judge Pickett]

JUDGE PICKETT, concurring.

I concur in reversal of the judgment in this case, but I think the decision should be based on broader grounds. The record is without dispute that the two girls left the place of their government employment to go on vacation. They were on vacation when they left their place of employment for Oklahoma City, and the real purpose of their trip was personal. Even if they intended to transport the government automobile to Oklahoma City for safekeeping, this would not meet the Oklahoma test of "scope of employment." In 1929, Justice Cardozo, in Marks' Dependents v. Gray, 167 N.E. 181, 183, said:

> ". . . To establish liability, the inference must be permissible that the trip would have been made though the private errand had been canceled. . . . The test in brief is this: If the work of the employee creates the necessity for travel, he is in the course of his employment, though he is serving at the same time some purpose of his own. Clawson v. Pierce-Arrow Motor Car Co., 231 N. Y. 273, 131 N. E. 914. If, however, the work has had no part in creating the necessity for travel, if the journey would have gone forward though the business errand had been dropped, and would have been canceled upon failure of the private purpose, though the business errand was undone, the travel is then personal, and personal the risk."

This "Cardozo Formula" was specifically adopted by the Supreme Court of Oklahoma in Anderson v. Allis-Chalmers Manufacturing Company, 387 P.2d 479, 482 (1963), and Dobson v. Commercial Oil Transport, Inc., 371 P.2d 709, 711 (1962). No contention is made that the work of the girls created the necessity for the travel or that the travel to Oklahoma City would have been made on behalf of the employer if the employees' vacations had been canceled.

APPENDIX B

[Opinion of the United States District Court for the Western District of Oklahoma]

Betty ERWIN, Plaintiff,
v.
UNITED STATES of America,
Defendant.

Civ. No. 68-320.
United States District Court
W. D. Oklahoma.

Aug. 25, 1969.

Action under Federal Tort Claims Act for personal injuries, expenses and loss of support and maintenance. The District Court, Bohanon, J., held that employee of United States was acting within course and scope of her employment at time of the accident when she was operating government vehicle with dual purpose of catching airplane as part of her vacation and of taking automobile to place of safe storage during her vacation, and that the employee was guilty of gross negligence which was the direct and proximate cause of the injuries complained of.

Judgment accordingly.

1. Automobiles Key 187

Employee of United States was acting within the scope of her employment at the time of fatal automobile collision, so as to render the United States liable for consequences of her negligent acts, where she was transporting government automobile to Oklahoma City for storage because it would have been unsafe to leave the vehicle at her home during her vacation though employee was also proceeding to Oklahoma City to catch an airplane as part of her vacation. 28 U.S.C.A. §§ 1346(b), 2671-2680.

2. Master and Servant Key 302(6)

Where servant is acting for master and also for his own pleasure, the master is liable for servant's negligent acts.

3. Judgment Key 696

Injured party was entitled to bring action against United States under Federal Tort Claims Act for injuries caused by negligent acts of employee of the United States acting within the scope of her employment, though prior action against estate of the employee had been decided adversely to the injured party. 28 U.S.C.A. §§ 1346(b), 2671-2680.

4. Automobiles Key 201(1)

Employee of United States, acting within scope of her employment, was guilty of gross negligence which directly and proximately caused the accident and resulting injuries where she either did not stop at stop sign or, after stopping, drove onto through highway when she could have seen, or should have seen, the other vehicle. 28 U.S.C.A. §§ 1346(b), 2671-2680.

Howard K. Berry, James W. Bill Berry and Howard K. Berry, Jr., Oklahoma City, Okl., for plaintiff.

William R. Burkett, U. S. Dist. Atty., John W. Raley, Jr., Asst. U. S. Dist. Atty., James W. Shepherd, David W. Edmonds and George W. Dahnke, Foliart, Shepherd, Mills & Niemeyer, Oklahoma City, Okl., for defendant.

OPINION

BOHANON, District Judge.

This action is brought under the provisions of the Federal Tort Claims Act, 28 U.S.C. §§ 1346(b), 2671-2680, and involves an automobile accident which occurred on June 22, 1967, in Beckham County, near the city of Sayre, Okla-

homa, in which three people were killed and one seriously injured.

The plaintiff, Betty Erwin, was a passenger in an automobile being driven by her husband, Louis Odell Erwin, deceased, traveling west on State Highway 152 in Beckham County, Oklahoma, near Sayre, Oklahoma; Margaret Ann Stack, deceased, a VISTA volunteer in the government's anti-poverty program, the driver of the other vehicle involved in the accident, was traveling north on State Highway 34 where it intersects with State Highway 152, and it was in the intersection of these two highways where the accident occurred resulting in the deaths referred to and the serious injury mentioned. Diane Short, deceased, another VISTA worker, was a passenger in the government vehicle.

Plaintiff alleges and relies upon the alleged agency of Margaret Ann Stack, acting in her capacity as a servant of the defendant and her negligence in the operation of the automobile, which belonged to the United States Government, as the proximate cause of the collision and resulting injuries.

The defendant by Answer denies that Margaret Ann Stack was driving on a business mission on behalf of the United States or in the furtherance of a benefit to the United States or that she was acting within the scope of her employment at the time of the accident; defendant further denies that driver, Margaret Ann Stack, was negligent or in anywise caused or brought about the accident involved, but alleges that the driver of the Erwin automobile was negligent, which was the cause of the accident.

It is admitted that the automobile driven by Margaret Ann Stack was owned by the United States, and that Margaret Ann Stack was an employee of VISTA and as such was an employee of the defendant for the purposes of the Federal Tort Claims Act. The questions presented in this case are: (1) Was Margaret Ann Stack at the time of the

accident in question acting in the scope of her service and employment for the United States Government? and (2) If so, was she negligent in the operation of the vehicle in question, and was such negligence the proximate cause of the resulting accident and damages?

The Court finds the facts as hereinafter set forth in this Opinion. Margaret Ann Stack was a VISTA volunteer, and as such, she was furnished and assigned a Ford station wagon by the defendant, United States of America, Excess Property Department of General Services Administration, for her use in the furtherance of the Government's anti-poverty program; she was also charged with the duty and responsibility of protecting the station wagon and caring for it, within reasonable limits; she and her co-worker had exclusive use of the vehicle; she was assigned to work in the Jackson-Greer-Harmon County area of Oklahoma and was subject to call 24 hours a day 7 days a week and was given broad latitude, or discretion, in the operation of the automobile and in its use in the Government's service and also the caring for it; the station wagon automobile involved was assigned to Southwest Community Action Committee, Altus, Oklahoma, by General Services Administration for use in the three counties above mentioned to aid migrant workers and their families and other poverty-stricken persons in the area, as a part of the Government anti-poverty program, and the station wagon was assigned to Margaret Ann Stack as a VISTA volunteer for use in the furtherance of this work. The evidence shows that the assignment of the vehicle was for use in the counties above mentioned, and the General Services Administration restricted its use to said three-county area.

Margaret Ann Stack had earned and was entitled to a seven-day vacation, beginning on June 22, 1967, the date of the fatal accident, and she was proceeding to Oklahoma City to catch an airplane to further her vacation. She was confronted with a problem of what to do with the vehicle

which was entrusted to her while she was away on her vacation, and she concluded that she should take the automobile to Oklahoma City and store it, and the evidence is clear and convincing that this is what she intended to do; the evidence further shows that it would not have been safe to leave the automobile at the residence of Margaret Ann Stack in Mangum, Oklaho...a, because she lived in an area which was subject to vandalism and thievery, and it would not be consistent with good care of government property to leave the station wagon at her residence, but on the other hand, out of apparent concern for the safety and proper care of the automobile, she was driving it to Oklahoma City for storage, and did so in good faith so far as this record shows.

The Court finds that the two VISTA girls who were leaving on their vacation, Margaret Ann Stack and Diane Short, went to the office of Southwest Community Action Committee and requested Mr. Haven, the County Manager at Mangum to call Mr. Mason, Executive Secretary of the Oklahoma County VISTA program at Oklahoma City, which Mr. Haven did, and this long distance call was made for the purpose of securing Mr. Mason's assistance in finding a place to store the automobile while the girls were on their vacation. Mr. Mason told them to bring the automobile to Oklahoma City, and he would assist them in making arrangements for its storage.

Margaret Ann Stack and a VISTA co-worker, Diane Short, also on her vacation, were both instantly killed in the accident and were not present to testify in the case; the record is void of any instructions given to Margaret Ann Stack as to what should be done with the automobile while she was on vacation; knowing that she was going on vacation, her superiors gave her no instructions as to the storage and care of the automobile, and hence she brought the same or attempted to bring the same to Oklahoma City for safe storage to protect the defendant's property, which was her duty.

The evidence shows, and the Court finds that the bringing of the station wagon to Oklahoma City had a two-fold purpose, and one purpose was in the furtherance of the employee's sincere desire to preserve government property, and the other purpose was the trip to Oklahoma City to further her vacation.

The Court finds that the accident occurred about 10:00 a.m. on June 22, 1967, during ordinary work and business hours, on the primary route between Mangum, Oklahoma, and Oklahoma City, while being operated for the dual purpose above stated.

The evidence further shows that at the headquarters at Mangum, Oklahoma, there was no garage, motor pool or similar facility available for the storing of the station wagon, and no directive was made or given Margaret Ann Stack to deliver it to any particular place when it was not in actual use.

[1] Under the facts above found, the Court is of the opinion that Margaret Ann Stack, at the time of the accident, was acting in the scope of her employment and in furtherance of a benefit to the defendant to preserve and protect its property. This conclusion is supported by the case of Stumpf v. Montgomery, 101 Okl. 257, 226 P. 65, 32 A.L.R. 1490, which provides and states as follows:

> "Evidence of defendant's ownership of the car, coupled with proof that the driver was in his employment, raises the legal presumption that, at the time of the accident, the driver was acting for the owner and within the scope of his employment, and the burden of proof is then placed upon the defendant to prove that, at the time of the accident, the driver was not acting for him, but was using the machine for his own purposes or outside the scope of the employment."

See also DeCamp v. Comerford, 134 Okl. 145, 272 P. 475.

It is true that as between the defendant and Margaret Ann Stack's superiors at Mangum, Oklahoma, the use of the station wagon was restricted to the three-county area mentioned, and it is likewise true that Margaret Ann Stack had the duty and obligation of caring for the automobile, the government's property. It is not every violation of a company rule (government rule here) by an employee, standing alone, that will prevent the application of the doctrine of respondeat superior in all situations. In 35 Am.Jur., Sec. 559, it is said in part, as follows:

> "Also, as a general rule, an employer is liable for acts of his employee within the scope of the latter's employment notwithstanding such acts are done in violation of rules, orders, or instructions of the employer."

In light of the above stated rule, the Court must give consideration to the matter of "scope of employment" of Margaret Ann Stack in driving the station wagon at the time and place in question. Margaret Ann Stack had two purposes in mind; one to come to Oklahoma City to further her vacation and secondly to care for her employer's property as it was her duty to do, considering the circumstances and manner in which the automobile was furnished to her and entrusted to her care.

In considering this problem, the following from 35 Am. Jur. Sec. 553 is pertinent, and provides:

> "Meaning of 'Scope of Employment.'—Acts impliedly authorized or such as are within the 'scope of employment'—that is, wrongs for which the employer may be held accountable—are said not to be susceptible of precise or even very helpful definition by any phrase or short form of expression. In practically every case, the authority from the master is to be gathered from and determined by the surrounding facts and circumstances—the character of the employment and

the nature of the wrongful act. Among the many factors to be taken into consideration may be mentioned the employer's ownership of the instrumentality by means of which the employee inflicted the injury and the fact that it was furnished to the employee by the employer, although the mere intrusting of an instrumentality to the employee by means of which he commits a tort is not of itself, unless the instrumentality is one classed as a dangerous instrumentality, sufficient to establish vicarious liability."

"Other factors to be considered are the time at which the wrongful act was done—whether at a time when the employee was not obligated to perform any duty for the employer, in which case the latter is not ordinarily to be held responsible—the place at which the wrongful act was done, the purpose of the act, the personal motive of the employee, whether the act is one commonly or usually done by employees engaged in similar capacities, or whether the employer had reason to expect that an act of the character complained of would be committed by the employee.

"A servant is acting within the scope of his employment when he is engaged in doing for his master what he has been directed to do, or, as it has been said, 'any act which can fairly and reasonably be deemed to be an ordinary and natural incident or attribute of that act, or a natural, direct, and logical result of it' is within the meaning of the phrase 'scope of employment.' The test is the nature of the tortious act and its relation or nonrelation to that which the actor was employed to do. If the employee, being engaged about the business of the employer, adopts methods which he deems necessary, expedient, or convenient, and the methods adopted prove hurtful to others, the employer may be held liable. The purpose of the employee's act, rather than the method of performance thereof, is said to be the important consideration."

The facts and circumstances in this case which support "employment with and scope of employment" are: Margaret Ann Stack was employed by the defendant. Margaret Ann Stack was furnished an automobile for her exclusive use in the performance of her duties, which vehicle was owned by the defendant. Her immediate employer at Mangum, Oklahoma, knew she was leaving to begin her vacation and knew she had possession of the vehicle in question; her employer at Mangum, Oklahoma, did not instruct her or tell her what to do with the vehicle while she was on her vacation; it would have been dangerous for Margaret Ann Stack to leave the vehicle unattended at her residence in a poor neighborhood where vandalism was prevalent; it was her duty and obligation to care for the vehicle in question and not subject it to undue risk, and one of the purposes of bringing the automobile to Oklahoma City was to properly protect it and the other was to begin her vacation.

[2] It was while on this dual mission that the fatal accident occurred. Where the servant is acting for the master and also for his own pleasure, the master is liable for the servant's negligent acts. Weakley v. Southwestern Bell Telephone Co., 240 F.Supp. 598 (Okla.); United States v. Kennedy, 230 F.2d 674 (9 C.A.); Cooner v. United States, 276 F.2d 220 (4 C.A.); Courtright v. Pittman, 264 F.Supp. 114 (Colo.).

With respect to deviation or departure from her master's business, it is stated in 35 Am.Jur., Sec. 555 as follows:

> "Deviation or Departure from Master's Business for Own Pleasure or Business.—One of the most difficult problems in determining the liability of an employer for the acts of his employee arises where the employee at the time of the injurious occurrence had deviated from the usual course which his duties required him to take for some purpose of his own. While the mere

fact that the employee was at the time of the injury combining his own business or pleasure with the business of the master does not necessarily relieve the master from liability, it is clear that an employer's liability is not to be determined by the fact that the wrongful act of his employee was committed during the employee's working hours or before the task to which he had been especially assigned was finished. The test of the liability of the employer is whether at the very time of the injurious occurrence, the employee was performing some act in furtherance of his master's business as well as an act in his own interest." (See cases cited above)

Where there is a deviation from the authority granted an employee and the deviation is slight, the Court may and often will, as a matter of law, determine that the servant was executing his master's business; where the deviation is extreme and there is a complete departure from the master's business, it is generally held that there is no liability. But, cases falling between these extremes will be regarded as involving merely a question of fact, to be left to the jury or other trier of such questions. 35 Am.Jur., Sec. 556.

Where a servant deviates from his master's instructions for his own purpose, yet with the intention of also pursuing his master's business, the master will generally be help responsible. Lee v. Pierce, 112 Okl. 212, 239 P. 989; Brayton v. Carter, 196 Okl. 125, 163 P.2d 960. The personal motive of Margaret Ann Stack standing alone does not prevent her from being within the scope of her employment for the defendant. S & W Construction Company v. Bugge, 194 Miss. 822, 13 So.2d 645, 146 A.L.R. 1190, and cases cited, supra.

From a consideration of all of the facts, the Court finds that Margaret Ann Stack at the time and place of the accident involved in this case must be deemed to have been acting within the scope of her employment and for her em-

ployer's benefit, and the defendant is, therefore, responsible for the consequences of her acts under the doctrine of respondeat superior.

[3] Not heretofore noted in this Opinion, the defendant interposed another defense by its Third Amended Answer, asserting that the plaintiff in this case is estopped to litigate this action, and specifically any issue of fact with respect to the alleged negligence of Margaret Ann Stack because said matter had theretofore been litigated in an action between Betty Erwin, as plaintiff, against F. H. King, Administrator of the Estate of Margaret Ann Stack, deceased, Cause No. 183547, in the District Court of Oklahoma County, Oklahoma, which case was concluded by a judgment on a jury verdict in favor of the defendant, wherein the negligence of Margaret Ann Stack, deceased, was decided adversely to the plaintiff. It is the position of the defendant that the District Court Judgment, which is now on appeal to the Supreme Court of Oklahoma, constitutes a bar to this action. This Court cannot agree. Under 28 U.S.C., Sec. 1346(b), it is said:

> "* * * the district courts, * * * shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages * * * for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred."

Since this Court has held that Margaret Ann Stack was acting within the scope of her employment for the United States, it follows that plaintiff's exclusive remedy lies in the United States Courts and not the State Courts. Frazier v. Nabors, and United States of America, 273 F.

Supp. 148 (E.D.Tenn., 1967). Inasmuch as the plaintiff alleged, and the Court has found that Margaret Ann Stack was an employee of the United States and acting within the scope of her employment and for the benefit of the United States, exclusive jurisdiction of this action lies in the United States Courts, and no judgment of the State Court will operate as a bar or as an estoppel, even though the plaintiff in the State Court action may have misconceived or misjudged the jurisdiction of the State Court.

[4] Turning now to the accident itself and the responsibility therefor, the Erwin automobile was traveling on a through highway in clear weather during the daytime with no visibility obstructions. Likewise, Margaret Ann Stack was driving on a less favored highway and at right angles to the approaching Erwin automobile. The Erwin automobile was traveling west, and the Stack automobile was traveling north. There were early warning signs approaching, and a stop sign at the intersection commanding the Stack automobile to stop before entering the highway upon which the Erwin automobile was traveling. The Court finds that Margaret Ann Stack failed to stop at the stop sign, or if she did stop, she drove onto the favored highway when she could see, or should have seen, that she could not do so with safety and that to attempt to cross the highway in front of the Erwin automobile, which was an immediate hazard and by so doing would in all probability result in a collision. The Court finds from all the facts and circumstances in evidence that the accident and resulting injuries to all of the parties was caused directly and proximately by gross negligence on the part of Margaret Ann Stack, defendant's employee, and for which the defendant is liable. The Court further finds that the driver and occupant of the Erwin automobile were not negligent.

The Court finds that the deceased, Louis Odell Erwin, was at the time of his death 35 years of age and had a normal life expectancy of approximately 36.69 years; that the

said deceased was gainfully employed, earning approximately $14,000.00 per year; that he contributed his earnings for his own support, and for the support, maintenance, education and comfort of his wife, Betty Erwin, and his two minor children, Kevin Erwin, age 5 and Stanley Erwin, age 7.

The Court further finds that the plaintiff, Betty Erwin, suffered extensive and serious injuries in the accident involved in this case, which required surgical procedures, medical and hospital expenses and that she suffered great physical pain and mental anguish.

The Court finds that the plaintiff for herself and for her said minor children, Kevin Erwin and Stanley Erwin, has been damaged and is entitled to recover from the defendant the aggregate sum of $125,315.00 which the Court finds should be apportioned as follows, to-wit: (a) to Betty Erwin for her personal injuries, medical expenses, hospital expenses, pain and suffering, and for property damage, the sum of $35,315.00; (b) to Betty Erwin for her loss of support and maintenance because of her husband's wrongful death, the sum of $30,000.00; (c) to Betty Erwin for the use and benefit of Kevin Erwin for his support, maintenance and education, the sum of $30,000.00; and (d) to Betty Erwin for the use and benefit of Stanley Erwin, for his support, maintenance and education, the sum of $30,000.00.

The Court concludes that this Court has original and exclusive jurisdiction over the parties to this action and the subject matter thereof; that the Estate of Margaret Ann Stack is immune from any liability. 28 U.S.C.A. § 2679.

Judgment will be entered accordingly.

APPENDIX C

[Order denying Petition for Rehearing]

JULY TERM—AUGUST 18, 1971

Before Honorable John C. Pickett, Honorable Jean S. Breitenstein and Honorable Oliver Seth, Circuit Judges.

BETTY ERWIN,	)	
	)	
Appellee and Cross-Appellant,	)	
	)	
v.	)	Nos. 140-70
	)	and 141-70
UNITED STATES OF AMERICA,	)	
	)	
Appellant and Cross-Appellee.	)	

Upon consideration of request for permission to file supplement to petition for rehearing, leave is granted to file same.

It is further ordered that the petition for rehearing and supplement thereto be and the same is hereby denied.

APPENDIX D

[Order staying Mandate to and including September 17, 1971]

JULY TERM—SEPTEMBER 1, 1971

Before Honorable John C. Pickett, Honorable Jean S. Breitenstein and Honorable Oliver Seth, Circuit Judges.

BETTY ERWIN,	)	
	)	
Appellee and Cross-Appellant,	)	
	)	
v.	)	Nos. 140-70 and 141-70
UNITED STATES OF AMERICA,	)	
	)	
Appellant and Cross-Appellee.	)	

Upon consideration of motion of Appellee and Cross-Appellant to stay issuance of mandate, it is ordered that the mandate is stayed to and including September 17, 1971, pursuant to Rule 41(b), Federal Rules of Appellate Procedure, pending certiorari.

APPENDIX E

[Enlargement of time for stay of Mandate]

SEPTEMBER TERM—SEPTEMBER 21, 1971

Before Honorable John C. Pickett and Honorable Jean S. Breitenstein, Circuit Judges

BETTY ERWIN,

Appellee and Cross-Appellant,

v.

Appellant and Cross-Appellee.

UNITED STATES OF AMERICA,

Nos. 140-70 and 141-70

For cause shown, the September 1, 1971 Order for Stay of Mandate is modified by the enlargement of the time for Stay of Mandate pursuant to Rule 41(b), Federal Rules of Appellate Procedure, to and including October 1, 1971.

HOWARD K. PHILLIPS, Clerk

By: s/ Anne M. Cabot
Anne M. Cabot
Deputy Clerk

A true copy
Teste
(SEAL)

Howard K. Phillips
Clerk, U. S. Court of
Appeals, Tenth Circuit

By s/ Anne M. Cabot
Deputy Clerk

In the Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-470

BETTY ERWIN, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

In this Federal Tort Claims Act suit, the central issue raised by petitioner is whether the court below correctly interpreted and applied Oklahoma law in ruling that the federal employee was not acting within the scope of her employment at the time of the accident. Since the decision below is correct and since this Court will normally defer to the courts of appeals on questions of state law, review by this Court is unwarranted. See *Propper* v. *Clark*, 337 U.S. 472, 486-

487; *United States* v. *Durham Lumber Co.*, 363 U.S. 522, 526-527.

1. The only torts for which the United States may be held liable under the Act are those committed by federal employees while on official business and acting within the scope of their employment. 28 U.S.C. 1346(b). Nor is there any doubt that the law of the state, where the alleged negligence took place, is controlling on this question. *Williams* v. *United States*, 350 U.S. 857. Similarly, it is settled that ownership by the United States of a vehicle involved in an accident does not alone establish a basis for imposing liability under the Act. *Dalehite* v. *United States*, 346 U.S. 15, 45.

2. In conformity with the foregoing principles, the court below properly applied Oklahoma law and concluded that the federal employee—who at the time of the accident had begun her annual vacation and was driving a car owned by the United States to Oklahoma City to catch a plane for home—was driving the car for purely personal reasons (Pet. App. iii). Moreover, even if a purpose of the trip was to leave the federal car in Oklahoma City for safekeeping during the driver's vacation, the trip was still not within the scope of her employment under Oklahoma law which follows the so-called "Cardozo formula" [1]

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[1] Mr. Justice Cardozo in *Matter of Marks* v. *Gray*, 251 N.Y. 90, 167 N.E. 181, set forth what has become the universally accepted test to be applied in "dual purpose" cases (251 N.Y. at 93-94, 167 N.E. at 183):

> The test in brief is this: If the work of the employee creates the necessity for travel, he is in the course of his

in "dual purpose" cases (see concurring opinion below; Pet. App. v).

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

NOVEMBER 1971.

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employment, though he is serving at the same time some purpose of his own. *Clawson* v. *Pierce Arrow Motor Car Co.*, 231 N.Y. 273, 131 N.E. 914. If, however, the work has had no part in creating the necessity for travel, if the journey would have gone forward though the business errand had been dropped, and would have been canceled upon failure of the private purpose, though the business errand was undone, the travel is then personal, and personal the risk.

The Oklahoma Supreme Court adopted the test in *Cochran* v. *Maassen Tool & Supply Co.*, 204 Okla. 60, 226 P. 2d 953, and reaffirmed its adherence to it in *Dobson* v. *Commercial Oil Transport, Inc.*, 371 P. 2d 709, and *Anderson* v. *Allis-Chalmers Manufacturing Company*, 387 P. 2d 479.

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